United States Court of Appeals

for the Second Circuit

REPLY BRIEF

ORIGINAL **75-6081**

To be argued by
MARTIN LONDON
EUGENE R. ANDERSON

United States Court of Appeals
For the Second Circuit

BROWN & WILLIAMSON TOBACCO CORPORATION,
against *Plaintiff-Appellant,*
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6081

PHILIP MORRIS INCORPORATED,
against *Plaintiff-Appellant,*
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6085

R. J. REYNOLDS TOBACCO COMPANY,
against *Plaintiff-Appellant,*
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6088

LOEW'S THEATRES, INC.,
against *Plaintiff-Appellant,*
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6087

AMERICAN BRANDS, INC.,
against *Plaintiff-Appellant,*
FEDERAL TRADE COMMISSION, et al.,
Defendants-Appellees.

75-6090

LIGGETT & MYERS INCORPORATED,
against *Plaintiff-Appellant,*
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6089

On Appeal from the United States District Court for the Southern District of New York

JOINT REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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JOINT REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Preliminary Statement

The Court below denied plaintiffs' application for a stay of the accrual of penalties by distinguishing between mandatory and discretionary penalties. (A297-99*) In so doing, it failed to recognize the obvious—that a threat of huge discretionary penalties such as those involved here can more effectively deter one from seeking judicial review than a threat of modest mandatory penalties.

Rather than defend the premise of the decision below, the FTC has trotted out another theory. It now asserts that the denial of a stay was proper because the public interest in effective enforcement of FTC orders requires what —in a model of understatement—it chooses to call "a degree of severity." (Def. br.** 12).

The FTC's belated attempt to substitute its "public interest" rationale for Judge Tenney's decision below is ill-conceived; it assumes the very point at issue. All would concede that the public interest is served by enforcement of FTC consent orders. But the FTC nowhere suggests that plaintiffs have failed to demonstrate at least that they have raised serious questions as to whether the FTC's August 1, 1975 determination is inconsistent with the consent orders here involved. To the contrary, Judge Tenney assumed such a showing below. (A297) Thus, there is a substantial question as to whether the FTC is using the threat of the potentially enormous cumulative penalties to which plaintiffs are exposed, barring a stay, to induce compliance with an FTC determination of violations of those orders that is erroneous as a matter of law. And surely there is no legitimate public interest in coercing these plaintiffs, or anyone else, to comply with an erroneous administrative determination.

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* Refers to pages of appellants' appendix.

** Refers to defendants' brief.

The FTC suggests also that the public interest warrants denial of a stay here because a danger to public health is involved. (Def. br. 23-24, A270) With all respect, that suggestion is nonsense. This dispute concerns matters such as the spacing between the two lines of type in the health warning statement and whether the warning should be set in 12 or 14 point type, a difference of 2/72nds of an inch. (*E.g.*, A394-98) There is no suggestion that plaintiffs have been guilty of wholesale failure to display the warning in advertising clearly covered by the orders. To the contrary, there can scarcely be a literate man, woman or child in the United States who is unaware of the health warning statement. Indeed, most Americans probably could recite it substantially verbatim, as it has appeared on every package of cigarettes distributed in this country for nearly a decade and in substantially all of the plaintiffs' advertising since mid-1972, when the consent orders here at issue became effective. The simple truth is that the Commission is engaged in nitpicking, and it should not be permitted to pull the wool over the Court's eyes by muttering the incantation "public health."

ARGUMENT

I

The district court should have exercised its discretion to stay accumulation of penalties.

A. The Discretionary Nature of Section 5(*l*) Penalties Is Irrelevant.

The district court denied plaintiffs' application for a stay of penalties on the ground that plaintiffs failed to demonstrate either a threat of irreparable injury or that the balance of the equities tips in their favor. (A299) In so doing, it rejected plaintiffs' claim that the threat of

potentially enormous penalties under Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. §45(*l*), impermissibly deters them from seeking judicial review of the FTC's determination that they had violated the consent orders. It did so on the mistaken assumption that "mandatory" penalties necessarily are greater deterrents to the exercise of the right to judicial review than the discretionary penalties involved here. (A298-99) Thus, it reasoned that since an enforcement court might ultimately conclude that no penalties were warranted even if violations did occur, plaintiffs are threatened with no necessary hardship no matter how large the penalties that might be imposed. It distinguished *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1961), on the ground that the penalties involved in *St. Regis* were "mandatory in nature." (A297)

With respect, we submit that the district court's reliance upon a distinction between discretionary and mandatory penalties was erroneous and should be rejected. Significantly, the FTC's answering brief abandons the district court's mandatory-discretionary distinction almost entirely. Apparently the FTC now recognizes, as the court below did not, that the mandatory-discretionary distinction is logically untenable and unsupported by the cases.

A moment's reflection will demonstrate that the distinction between discretionary and mandatory penalties is wholly illusory. A prospective litigant threatened with a fixed penalty of $100 in the event his suit fails is far more likely to pursue his right to judicial review than a potential litigant whose exposure is subject to the discretion of a court, but may be as high as $10,000. The possibility that the enforcement court may ultimately "temper" the potential harshness of the penalty is of little comfort to the potential litigant who must choose at his peril whether to submit to administrative fiat or risk substantial liability if he does not prevail in the courts. It is the risk that substantial penalties may be imposed which operates as the deterrent.

Just as common sense indicates that there need be no meaningful distinction between discretionary and mandatory penalties, so too do the decided cases. The FTC concedes, and the court below apparently recognized, that "a basic proposition [of] due process [is the] right of a person to initially contest the validity of a legislative or administrative order deeply affecting his affairs uninhibited by the prospect of ruinous penalties if the suit is lost." (Def. br. 9-10; A297-99) That principle is established by a long line of cases, many of which struck down statutory penalty schemes involving discretionary penalties. They did so on the ground that the penalty schemes, even where the penalties ultimately were discretionary, were unconstitutional deterrents to the right of judicial review.

For example, in *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331 (1920), one of the cases establishing the principle that due process requires an opportunity for safely testing in court the validity of an administrative order before any liability for penalties attaches, Justice Brandeis held that the penalty there involved—a fine "not exceeding $500 a day"—"might well deter even the boldest and most confident" from seeking judicial review even though the penalty was entirely discretionary. 252 U.S. at 336. Other courts, considering similar discretionary penalties, have employed the reasoning of *Oklahoma Operating Co.** *E.g.*, *Wadley Southern Ry.* v. *Georgia*, 235 U.S. 651, 654 (1915) (penalties not exceeding $5000 per day); *United States* v. *Pacific Coast European Conference*, 451 F.2d 712, 714, 717-19 (9th Cir. 1971) (statutory penalties of up to $1000 a day); *Allen* v. *Omaha Livestock Commission Co.*, 275 F. 1 (8th Cir. 1921) (fine not exceeding $5000 for each offense); *Farms Dairy*,

* Indeed, in Ford Motor Co. v. Coleman, Civil Action No. 75-1340, slip op. (D. D.C. Sept. 22, 1975), Judge Leventhal—doubtless troubled by the serious constitutional issue—granted the manufacturer a temporary restraining order staying the accrual of penalties to permit them to seek a further stay of penalties in the enforcement court. (We are informed that the government has appealed to the Supreme Court from that decision.)

Inc. v. *Agnew*, 16 F. Supp. 575, 585-86 (E.D. Va. 1936), *aff'd*, 300 U.S. 608 (1937) (penalty not exceeding $100); *cf. Continental Baking Co.* v. *Dixon*, 282 F. Supp. 285 (D. Del. 1968) (stay of penalties under 15 U.S.C. §45(*l*) available once penalties begin to accrue). Thus, the distinction drawn by the court below between discretionary and mandatory penalties finds no support in the decided cases.

The discretionary-mandatory distinction does not even provide a satisfactory basis for distinguishing *St. Regis*, *supra*, 368 U.S. 208. The statute at issue in *St. Regis* did provide that a violation was to be penalized by a forfeiture to the United States of "the sum of $100 for each and every day of the continuance of such" violation. 368 U.S. at 211-12 n.3. But despite this apparently mandatory language, the courts had discretion to mitigate the penalty in appropriate circumstances. Thus, this Court observed that "the statute's absolute and imperative terms would not prevent us from assuming that it could not have been Congress' intent so severely to punish an innocent offender" if the Court concluded that a violation involved "a single oversight or an honest mistake in a good faith attempt to comply with the Commission's order . . ." *United States* v. *St. Regis Paper Co.*, 285 F.2d 607, 614 (2nd Cir. 1960), *aff'd*, *St. Regis Paper Co.* v. *United States*, *supra*. Hence, even *St. Regis* involved penalties that were at least in some measure discretionary, contrary to the conclusion of the court below.

B. The Public Interest Does Not Outweigh the Irreparable Injury to Plaintiffs.

Apparently recognizing that the mandatory-discretionary distinction cannot justify the district court's denial of a stay, the FTC argues instead that a stay was properly denied because the public interest in effective enforcement of FTC orders must override the harm to plaintiffs threat-

ened by the risk of ever-increasing, potentially massive penalties pending court review of the FTC's determination. (Def. br. 23-24)

The district court did not consider the FTC's public interest argument because of its finding on the issue of irreparable injury. It did, however, endorse without further comment Judge Parker's statement in *Floersheim* v. *Weinburger*, 346 F. Supp. 950, 956 (D. D.C. 1972), *rev'd without consideration of the point sub nom. Floersheim* v. *Engman*, 494 F. 2d 949 (D.C. Cir. 1973), that stays of Section 5(*l*) penalties might encourage frivolous litigation.

The district court's fear of frivolous litigation has no application to this case and, in any event, is without basis. The district court here assumed, for purposes of the stay application, that plaintiffs have demonstrated a reasonable probability of success on the merits. (A297) No one suggests that plaintiffs' claims are frivolous. Moreover, the general proposition that a stay would encourage frivolous litigation is untenable. The stay need not be granted unless there are "reasonable grounds" to contest the administrative action. *Ford Motor Co.* v. *Coleman*, Civil Action No. 75-1340, slip op. at 9 (D. D.C. Sept. 22, 1975); *Oklahoma Operating Co.* v. *Love*, *supra*, 252 U.S. at 338; *United States* v. *Morton Salt Co.*, 338 U.S. 632, 654 (1950).

Finally, as we have shown, the FTC's "public health" argument cannot support the district court's denial of a stay. The argument is without basis in fact (*supra*, p. 3) and the Court below did not rely on it in any event.

II

Plaintiffs are entitled to a stay of penalties as a matter of law.

Plaintiffs plainly are entitled to have a court determine whether they in fact have violated the consent orders, as the FTC has determined. Plaintiffs should not be subjected to the risk that substantial penalties will accrue as the price of obtaining that review. Moreover, plaintiffs have demonstrated at least a substantial basis for asserting that the FTC's determination that plaintiffs have violated the consent orders is erroneous, and the FTC does not here claim otherwise. (*E.g.*, A17, A315-497). But as we have demonstrated, the risk of the potentially enormous cumulative penalties to which plaintiffs are exposed threatens to deter them from seeking that review. Indeed, the FTC admits as much in stating that one of the purposes of its determination was to induce "the plaintiffs to come forward with a more reasonable settlement offer." (A274)

The FTC concedes that due process necessarily includes the "right of a person to initially contest the validity of a legislative or administrative order deeply affecting his affairs uninhibited by the prospect of ruinous penalties if the suit is lost." (Def. br. 9-10) However, it attempts to distinguish the cases relied upon by plaintiffs* on the ground that they involved attacks on the validity of orders with respect to which there had been no prior opportunity for challenge. The FTC asserts that plaintiffs have waived their rights to attack the consent orders. Thus, it would have the Court conclude that plaintiffs are not entitled to a stay of penalties.

* Wadley S. Ry. v. Georgia, 235 U.S. 651 (1915); Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920); St. Regis Paper Co. v. United States, 368 U.S. 208 (1961).

But plaintiffs do not here challenge the validity of the consent orders. They challenge the validity of the FTC's determination that they have violated those orders. And the FTC's confusion on this point leads to two flaws in its position.

First, the FTC's focus on the consent orders rather than the determination of violations ignores plaintiffs' right to judicial review with respect to alleged violations of those orders, as well as the implications of plaintiffs' having raised serious questions as to whether the FTC's August 1, 1975 determination is inconsistent with the consent orders.

Second, it ignores the possibility that the FTC's extraordinary public determination that plaintiffs have violated the consent orders may put plaintiffs at substantially greater risk than the consent orders alone.

A. Plaintiffs Are Entitled to a Stay of Penalties Because They Have Raised Substantial Questions as to the Alleged Violations.

The FTC's effort to dispose of the *Wadley* line of cases on the ground that this case involves consent orders the validity of which is established ignores the fact that these plaintiffs have a right to judicial review of the FTC's determination that they have violated the consent orders. That right is utterly independent of the right they had to contest the original administrative proceedings that culminated in the consent orders. Thus, while plaintiffs concede that the consent orders have the same force and effect as orders entered after fully litigated proceedings, they have not waived their rights to litigate fully the issue of whether they have violated those consent orders.

The problem confronting plaintiffs is that the penalty provisions of the Federal Trade Commission Act deter

them from exercising their right to judicial review of the FTC's determination that they have violated the consent orders. They do so because the amount of the maximum penalties permitted and their cumulative nature threaten plaintiffs with enormous penalties if they choose to contest the alleged violations and then fail. Indeed, the cumulative nature of the penalties threatens "to penalize the act of litigating." *Ford Motor Co.* v. *Coleman,* Civ. Action No. 75-1340, slip op. at 16 (D. D.C. Sept. 22, 1975).

Once one recognizes the practical effect of potentially huge cumulative penalties on plaintiffs' right to seek judicial review of the FTC's determination that they have violated the consent orders, the applicability of the *Wadley* line of cases is clear. As Judge Leventhal recently put it, "[t]hese decisions [stand for the proposition] that the Constitution is offended when the penalty system is of such a nature as to create a virtual roadblock to judicial review." *Ford Motor Co., supra,* at 10. And that is precisely the effect of the penalty provisions involved here. The fact that the *Wadley* line of cases dealt with the validity of substantive administrative orders rather than determinations that orders had been violated is immaterial, as there is a right to judicial review in either case and the Constitution bars imposition of a penalty scheme that unduly inhibits the exercise of that right.

The FTC argues that the determination that plaintiffs have violated the consent orders does not impose any sanction; penalties instead are imposed for violations of the consent orders, the validity of which is established. (Def. br. 8n.) It suggests—without citation of authority—that plaintiffs therefore are not entitled to a stay of penalties pending their challenge to the FTC's determination.

This contention ignores the significance of the substantial basis for concluding that the FTC's determination was erroneous. Once such a showing has been made, there is a significant possibility that the threat of penalties may

coerce compliance not with the consent orders, but with an erroneous FTC interpretation of those orders. Since the Constitution bars penalty schemes which threaten to coerce compliance with possibly erroneous administrative action by the threat of enormous penalties, the source of the threat is immaterial. Plaintiffs are being forced to knuckle under to the FTC's determination by a threat of penalties. It does not matter whether those penalties are imposed for ignoring the FTC's determination or for violation of the consent orders themselves. The effect is the same. And the Constitution requires a stay of penalties to eliminate that threat, no matter what its source.

B. The FTC's Determination May Put Plaintiffs to Greater Risk Than the Consent Orders Alone.

The FTC's narrow focus on the consent orders ignores also the possibility that the FTC's August 1, 1975 determination may put plaintiffs at substantially greater risk than the consent orders alone. In order to appreciate this possibility fully, one must understand the extraordinary nature of the FTC's action in this case.

The statutory scheme for enforcement of FTC orders, whether consent orders or litigated orders, does not contemplate any administrative proceeding in the sense that we normally understand that term. There is no established adversary procedure within the FTC for determining whether a prospective defendant is in compliance with an order prior to the institution of enforcement proceedings in a federal court. The normal course of events is that the FTC staff determines that there is reason to believe an order is being violated and a recommendation for prosecution is made to the Commission. If the Commission elects to prosecute, an action for civil penalties is commenced.*

* With certain limitations, the FTC can now prosecute its own penalty actions. 15 U.S.C. §§45(*l*), 45(m)(1), 56. The Attorney General no longer has a veto power over the institution of enforcement proceedings.

The FTC does not necessarily give a prospective defendant notice that it deems it to be in violation of an order. *United States* v. *J. B. Williams Co.*, 498 F.2d 414, 434-35 (2d Cir. 1974). Thus, the Commission's action in formally and publicly "determining" that plaintiffs were in violation of the consent orders was an unusual event not contemplated by normal FTC procedures. The Commission's sole role ordinarily is that of prosecutor in an action brought in a United States district court. *See* 15 U.S.C. §§45(*l*), 45(m); *United States* v. *J. B. Williams Co., supra,* 498 F.2d at 422, 429-30.

The FTC's unusual action here has consequences for plaintiffs that are not normally encountered in FTC enforcement proceedings. Most importantly, plaintiffs are now on notice that the full Federal Trade Commission has determined that they have violated these consent orders, a circumstance which we believe is unique. Moreover, the formality of the Commission's action takes this case beyond a mere warning from the Commission's staff, as the staff's interpretation of a consent order may not be adopted by the Commission.

Since plaintiffs are now on formal notice that the FTC regards their current advertising as violative of the consent orders, they are faced with the likelihood that the FTC will contend that any future advertising that fails to comply with the FTC's determination is willful violation of the consent orders. While we submit that such a contention would be erroneous, plaintiffs must act with the realization that the FTC has made such a contention before and has prevailed. *See United States* v. *J. B. Williams Co.*, 354 F.Supp. 521, 552 (S.D.N.Y. 1973), *rev'd without consideration of the point,* 498 F.2d 414 (2d Cir. 1974) (disregard of FTC staff's interpretation of order evidence of bad faith or reckless disregard). Thus, plaintiffs not only must choose whether to continue *pendente lite* the conduct which is the subject of

this dispute. Now that they are on notice of the FTC's position, they must do so with the knowledge that an incorrect decision may subject them to even greater liability than they might otherwise have incurred on the theory that they defied the Commission. Hence, the FTC's determination—an extraordinary step apparently premised in part on the Commission's desire to secure a bargaining advantage—subjects plaintiffs to new and greater risks than the consent orders alone, thereby making a stay all the more essential.

III

The FTC's recent enforcement action underscores the need for relief.

Two days after the FTC served its brief on this appeal, it commenced civil penalty actions against each of the plaintiffs in the United States District Court for the District of Columbia.*

The filing of these actions merely underscores the need for a stay of penalties.

First, the penalty actions clearly demonstrate that the risk to which plaintiffs are subjected by the possible continued accumulation of civil penalties is by no means illusory. It belies the Commission's representation to the district court that a stay was not warranted because the FTC might not seek monetary penalties or might sue for less than the maximum amount (A280-81)—the complaints do seek monetary penalties.

Second, the complaints demonstrate the enormity of the risks to which plaintiffs are exposed. They allege that

* A copy of the complaint in United States v. Brown & Williamson Tobacco Corp. ("Brown & Williamson cpt."), which is representative, is printed as an Annex to this reply brief.

"[e]ach copy of every advertisement for cigarettes which defendants has caused to be published . . . constitutes a separate violation of the Commission's Order." (Brown & Williamson cpt. ¶11, *infra.*) Thus, the potential liability for a single advertisement in the Sunday *Daily News,* with its circulation of more than 3 million copies, is alleged by the FTC to be up to $30 billion. The presence of such an allegation in the FTC complaints can have only one purpose —to coerce compliance with the FTC's determination. And it is for precisely that reason that a stay of penalties is required.

Third, the FTC's enforcement actions do not embrace all of the alleged violations determined by the Commission. The August 1, 1975 letters to each of the plaintiffs specified certain alleged violations as to which the FTC would immediately seek penalties and others as to which the Commission stated it would commence penalty actions unless "these violations are remedied within 180 days from receipt of this order." (*E.g.,* A36-38) The penalty actions filed in the District of Columbia do not embrace any of the so-called "180-day issues." Thus, plaintiffs are confronted with the prospect of either acquiescing in the Commission's interpretation as to the 180-day issues or living with the possibility that penalties continue to accrue until those issues are determined, either in the action for pre-enforcement review now pending in the district court or in still another enforcement proceeding to be brought by the FTC at some unknown date in the future. Again, plaintiffs should not be subjected to such a choice, and the recent enforcement actions provide no relief from this dilemma.

IV

The district court has jurisdiction to stay the accumulation of penalties *pendente lite*.

The FTC has moved in the district court to dismiss plaintiffs' actions. The FTC characterizes its motion as one for dismissal on jurisdictional grounds. (Def. br. 3n.) But the substance of its motion is that plaintiffs' actions should be dismissed because they do not state a claim for pre-enforcement review of the FTC's August 1 determination. That issue is still pending before the district court and in any event is not relevant to whether the district court or this Court has jurisdiction to stay the accumulation of penalties.

The FTC's motion below also suggests, without specifically so asserting, that subject matter jurisdiction is lacking. But in this the FTC is clearly wrong. Plaintiffs' claims that the FTC's determination is inconsistent with the provisions of the consent orders, that plaintiffs are not liable for civil penalties under Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, and that the further accumulation of penalties should be stayed under Section 10(d) of the Administrative Procedure Act, 5 U.S.C. §705, all arise under the laws of the United States and an Act of Congress regulating commerce. The district court thus has subject matter jurisdiction over these claims. 28 U.S.C. §§1331 and 1337.

Finally, the district court's jurisdiction over plaintiffs' application to stay the severe penalties which deter their resort to judicial review is also supported by the All Writs Act, 28 U.S.C. §1651.* It is undisputed that the district

* Section 1651 provides in pertinent part:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

courts have original jurisdiction over penalty actions under Section 5 of the Federal Trade Commission Act. 28 U.S.C. §§1337, 1345, 1355. Thus, the district courts ultimately have jurisdiction to review the FTC's determination that plaintiffs have violated the consent orders. Given that jurisdiction, the All Writs Act empowers the district courts to consider plaintiffs' contention that this jurisdiction is threatened, and may in fact be destroyed, by the chilling effect of the ever-accumulating, massive penalties here at issue and to stay the accumulation of those penalties.

The Supreme Court has held in analogous circumstances that the courts of appeals have All Writs Act jurisdiction to grant a preliminary injunction against a proposed merger pending an administrative attack on the merger by the FTC, on the theory that the courts of appeals would ultimately have jurisdiction to review an FTC decision striking down a merger and effective relief at that stage might be impossible absent a preliminary injunction. *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966). *Accord, FTC* v. *PepsiCo, Inc.*, 477 F.2d 24 (2d Cir. 1973). By the same token, the All Writs Act empowers the federal courts to assure that plaintiffs' right to judicial review is not rendered meaningless by an onerous and unconstitutional penalty scheme.*

* The All Writs Act is properly raised as a basis of jurisdiction, although not alleged in the complaints below, by virtue of 28 U.S.C. §1653, which provides in pertinent part that "[d]efective allegations of jurisdiction may be amended, upon terms, in the . . . appellate courts."

Conclusion

For the foregoing reasons, the order of the district court should be reversed and a stay of the accrual of penalties under Section 5 of the Federal Trade Commission Act should be entered.

Respectfully submitted,

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October 27, 1975

Annex 1

ANNEX

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No.

UNITED STATES OF AMERICA,

Plaintiff,

v.

BROWN AND WILLIAMSON TOBACCO CORPORATION,
a corporation,

Defendant.

COMPLAINT

The United States of America, acting upon the notification to the Attorney General by the Federal Trade Commission (hereinafter, "the Commission"), brings this action under Section 5(*l*) and 16(a)(1) of the Federal Trade Commission Act [15 U.S.C. §§45(*l*) and 56(a)(1), *as amended,* Pub. L. No. 93-153, §408(c) (Nov. 16, 1973) and Pub. L. No. 93-637, §204(a)(1) (Jan. 4, 1975)], to recover civil penalties for violations of a final order to cease and desist issued by the Commission, and to secure injunctive relief, and alleges:

JURISDICTION AND VENUE

1. Subject matter jurisdiction is predicated upon 28 U.S.C. §§1331(a), 1337, 1345 and 1355.

2. Venue in the District of Columbia is based upon 28 U.S.C. §§1391(b-c) and 1395(a).

Annex 2

DEFENDANT

3. Defendant Brown and Williamson Tobacco Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, and has its office and principal place of business at 1600 West Hill Street, Louisville, Kentucky 40201.

4. At all times material herein, defendant has been engaged in the advertising, offering for sale, sale, or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PRIOR COMMISSION PROCEEDINGS

5. A Federal Trade Commission proceeding bearing Docket No. C-2183 in which defendant Brown and Williamson Tobacco Corporation was charged with violating Section 5(a) of the Federal Trade Commission Act [15 U.S.C. §45(a)], terminated with the issuance by the Commission on March 30, 1972, of an order to cease and desist certain deceptive practices. This order was served upon the defendant Brown and Williamson Tobacco Corporation, on April 7, 1972, and became final by operation of law 60 days thereafter.

6. A copy of the Commission's complaint and order, as well as proof of service upon defendant, is attached hereto as Exhibit A. Included in the Commission's order is the following language:

ORDER

I.

"It Is Ordered that respondent Brown and Williamson Tobacco Corporation, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees directly or through any

corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of cigarettes in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from advertising any such cigarette unless respondent makes in all advertisements of such cigarette a clear and conspicuous disclosure of the Statement prescribed in Section 4 of the Public Health Cigarette Smoking Act of 1969 (Public Law 91-222) which reads:

'Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.'

A. For the purposes of this Order, the term "cigarette" shall mean (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labelling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

B. For the purposes of this Order, the term "advertisement" shall mean all advertising in newspapers, magazines, and other periodicals published and distributed in the United States and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, and advertisements appearing on billboards placed or located within the United States and in other materials as specified in Sections D, E, and F.

C. For the purposes of this Order, the term "clear and conspicuous disclosure" shall mean that:

1. The language of the warning statement shall be precisely as prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

2. The warning statement shall be set in two horizontal lines parallel with the base of the advertisement, separated by leading equivalent to the lower case "x-height", excluding the ascending and descending letters of the particular type size. In any case where the width of an advertisement in any printed medium is too narrow because of the columnar format, the warning statement may appear in three lines provided there is full compliance with all other requirements in this definition.

3. The warning statement in newspaper, magazine, and other periodical advertisements shall appear in Univers 47 (Fdy) type style. The type size to be employed shall be the following:

10-point type	in newspaper, magazine, and other periodical advertisements of a trim size not larger than 65 square inches.
12-point type	in newspaper, magazine, and other periodical advertisements of a trim size larger than 65 square inches but not larger than 110 square inches.
14-point type	in newspaper, magazine, and other periodical advertisements of a trim size larger than 110 square inches but not larger than 180 square inches.
16-point type	in newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches.

A double full-page or a multiple full-page advertisement in any non-tabloid newspaper shall contain a

separate warning statement in 16-point type on each page. A double full-page or multiple full-page advertisement in any tabloid newspaper, magazine or other periodical shall not be required to contain more than one warning statement but the type size requirement shall be determined by the total aggregated size of the entire advertisement. An advertisement which occupies one full-page and part of another page in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on the full page on which the advertisement appears. An advertisement which occupies part of each of two or more pages in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on that page which contains the greater (or greatest) part of the advertisement.

4. Every warning statement shall be set in a ruled rectangle. The size of the rectangle shall be determined by providing at both ends and at both top and bottom a space between the type block and the enclosing rule not less than the following spaces: where 10-point type is used in the warning statement, the rule shall be 8-points away from the type block; where 12-point type is used in the warning statement, the rule shall be 10-points away from the type block; where 14-point type is used in the warning statement, the rule shall be 12-points away from the type block; and where 16-point type is used in the warning statement, the rule shall be 14-points away from the type block. The width of the rule enclosing the rectangle

shall be ¼-point where 10-point type is used in the warning statement; ½-point where 12-point type is used in the warning statement; ¾-point where 14-point type is used in the warning statement; and 1-point where 16-point type is used in the warning statement.

5. The warning statement shall be printed in black against a solid white background within the rectangle, and the enclosing rule shall be printed in black.

6. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement shall be a separate element in each advertisement and shall not contain or include any part of any picture, design, illustration or text within the advertisement. The warning statement in its rectangle shall not be contained or included as an integral part of any specific pictorial design or illustration; in particular, it shall not be made a constituent part of a reproduction of the package of cigarettes. The warning statement in its rectangle may be printed or superimposed upon any pictorial background portion of any advertisement.

7. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement may be positioned anywhere within the trim area of the advertisement, but shall not be positioned in the margin of any advertisement. The rectangle shall not be positioned immediately next to, or immediately contiguous to, any rectangular designs, elements, or similar geometric forms (other than a picture of the cigarette package) or immediately contiguous to any textual matter appearing in the advertisement.

8. Blurring or illegibility of the warning statement in its rectangle occurring for reasons beyond

the control of the respondent shall not be in violation of this Order.

D. On billboards of a size 24-sheets and larger, the type size of the warning statement shall be not less than 2 inches in height, and the rectangle and the enclosing rule shall be of a size, shape, contrast, and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On billboards of a size 6-, 7-, and 8-sheets the type size shall be not less than ¾ inches, on those of a size 2- through 5-sheets the type size shall be not less than ½ inch, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On 1-sheet billboards the type size shall be not less than 24-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On all public transit side cars of any shape the type size shall be not less than 18-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. All public transit and cards shall comply with the minimum requirements for 1-sheet billboards. The type style on any billboard or transit card shall be Univers 47 (Fdy) or a similar font.

E. On all point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, the warning statement within its rectangle shall be included in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7. In determining the size of the advertising display area in point-of-sale promotional materials consisting of two or more pages, the total advertising display area of each page on which any printed or graphic material appears shall be aggregated, and where the aggregate of the advertising display area, on which any printed or graphic material appears, exceeds 36 square inches, the warning statement within its rectangle shall be placed on one of those pages and proportionalized to the size of that page in accordance with Section C. The warning statement shall not be required on any non-media advertising and promotional materials offered or given to consumers; nor shall the warning statement be required on any promotional materials which are not for public display or public consumer exposure, and are distributed to cigarette wholesalers, dealers, and merchants.

F. All advertising contained in non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs shall contain the warning statement within its rectangle in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7.

G. Sections C, D, E, and F of this Order shall become effective sixty (60) days after it is finally issued, but to meet the general and ordinary deadlines for sub-

mission of advertising copy established by the medium by or in which the advertisement is to appear, the requirements of Sections C, D, E, and F shall not be applicable (a) to newspaper, magazine, or other periodical advertising for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type, to the production house, is less than forty-five (45) days after the date on which this Order shall become effective; (b) to advertising appearing on billboards for which copy must, according to the earliest practical date for replacement, be delivered in final form to the printer or painted or assembled on such billboards less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising appearing on billboards Sections C, D, E, and F shall become applicable one-hundred eighty (180) days from the date this Order shall become effective; (c) to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs which is delivered in final form to the printer less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs, Sections C, D, E, and F shall become applicable one-hundred forty (140) days from the date this Order shall become effective; or (d) to point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, delivered in final form to the printer less than forty-five (45) days from the date this Order shall become effective.

H. This Order shall not be applicable to signs on factories, plants, warehouses, and other facilities re-

lated to the manufacture or factory storage of cigarettes, to corporate or financial reports, or to employment advertising, or to advertising in tobacco trade publications not circulated to consumers.

7. Plaintiff realleges and incorporates by reference in each of the counts set out below all of the allegations contained in paragraphs 1 through 6 of this Complaint.

COUNT ONE

[Failure to Disclose Any Health Warning]

8. From about July 15, 1972, and continuously thereafter, in connection with the offering for sale, sale or distribution of cigarettes in commerce as "commerce" is defined in the Federal Trade Commission Act, defendant failed to disclose the health warning required by Part I of the Commission's Order in advertisements of such cigarettes which since July 15, 1972, it has disseminated or caused to be disseminated on numerous media point-of-sale and other promotional materials exhibited to purchasers, which have a surface containing an advertising display area of more than 36 square inches, thereby violating Section E or F of Part I of the Order. Included among such violations for example are:

A) Vending machine panels such as those appearing on vending machines manufactured or distributed from July 15, 1972, to present by:

NATIONAL VENDORS DIVISION OF U.M.C., INC.
5055 Natural Bridge
Saint Louis, Missouri

FAWN SALES DIVISION OF IVA, INC.
An Iowa Corporation

Annex 11

VENDOR COMPANY
7400 East 12th
Kansas City, Missouri

AUTOMATIC PRODUCTS, INC.
75 West Plato Blvd.
St. Paul, Minnesota

ROWE INTERNATIONAL, INC.
75 Troy Hills
Whippany, New Jersey

THE SEEBERG SALES COMPANY
Chicago, Illinois

PFD c/o POP ASSOCIATES, INC.
31 East 17th Street
New York, New York

B) Calendars such as the Kool calendar for 1974.

C) Store signs and counter racks

COUNT TWO

[Failure to Make a Clear and Conspicuous Disclosure Because the Health Warning Appears Too Small or is Improperly Placed]

9. From about July 15, 1972, and continually thereafter in connection with the offering for sale, sale or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, defendant failed to disclose clearly and conspicuously in advertisements of such cigarettes the health warning required by Part I of the Commission's Order in that

1. the health warning was disclosed to the public

a) in run of paper (ROP) newspaper advertisements in a type style different from that required, thereby violating Section C-3 of Part I of

the Order. Included among such violations for example is the Kool cigarette advertisement appearing in El Diario-La Prensa, November 21, 1973.

b) in run of paper (ROP) newspaper advertisements and on counter racks and store signs in a type size smaller than that required for the advertisement's trim size or for its advertising display area, thereby violating Section C-3 of Part I of the Order. Included among such violations for example is the Kool cigarette advertisement appearing in El Diario-La Prensa, November 21, 1973, and the Viceroy racing car counter rack.

2. the health warning in newspaper, magazine or other periodical advertisements was disclosed immediately next to, or immediately contiguous to, other rectangular designs, elements, or similar geometric forms, thereby violating Section C-7 of Part I of the Order. Included among such violations for example is the Raleigh cigarette advertisement appearing in *Sports Afield Magazine,* April 5, 1974.

COUNT THREE

[Failure in Foreign Language Advertisements to Make a Clear and Conspicuous Disclosure of the Warning]

10. From about November 13, 1973, and continually thereafter, in connection with the offering for sale, sale, or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, defendant failed to disclose clearly and conspicuously in advertisements of such cigarettes the health warning required by Part I, Sections C-1, D or E of the Commission's Order in that

1. the health warning was disclosed in a language different from that principally used in the advertisement. Included among such violations for example is the Kool cigarette advertisement appearing in *El Diario-La Prensa,* December 26, 1973.

2. the health warnings were disclosed in language different from that prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969. Included among such violations for example is the Kool Spanish Store Sign cigarette advertisement.

11. Each copy of every advertisement for cigarettes which defendant has caused to be published or otherwise exhibited to consumers since the dates specified in the above counts and which has failed to conform to one or more of the specifications stated in the above counts constitutes a separate violation of the Commission's Order.

12. Due to defendant's consistent failure to comply with the terms of the Commission's Order, its cigarette advertisements have either omitted the health warning or have disclosed it in an unclear and inconspicuous manner, thereby denying the public proper notice of the dangers to health determined by the Surgeon General to be inherent in cigarette smoking.

REMEDY AT LAW INADEQUATE

13. Defendant's violations are many and widespread, and have prevented consumers from receiving the warning required by the Order. Monetary penalties alone will be inadequate to deter defendant from future violations and will not redress the past failures to disclose the health warning.

Annex 14

PRAYER

WHEREFORE, plaintiff demands judgment against defendant for each and every violation charged in this Complaint and requests that the Court as provided by law (15 U.S.C. §45(*l*)):

1. Award plaintiff monetary civil penalties from defendant Brown and Williamson Tobacco Corporation.

2. Require defendant Brown and Williamson Tobacco Corporation to create in an amount to be determined by this Court a trust fund to be used for the preparation and dissemination of such broadcast, print, or other advertisements as will be chosen and published by a master to be appointed by this Court and as will be acceptable to the Commission for the purpose of remedying defendant's failures to disclose a clear and conspicuous warning of the dangers to health that the Surgeon General has determined exist with cigarette smoking.

3. Enjoin permanently the defendant Brown and Williamson Tobacco Corporation from further violations of the Commission's Order, and award plaintiff the costs of bringing this action as well as such other and additional relief as may be proper and just.

[Signatures omitted]

Service of TWO copies of the
within Brief is hereby
admitted this 27th day of
Oct. 1975
Signed Richard J. Wertheimer
Attorney for U.S.

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906
(4682)